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Court of Appeals
Division III
State of Washington
3/30/2020 1:18 PM

NO. 36534-4-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

AMEL WILLIAM, APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRANT COUNTY

Superior Court Cause No. 17-1-00072-1

BRIEF OF RESPONDENT

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I. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.....1

Dalluge's conditions of release required a \$5,000 signature bond, weekly contact with his lawyer, the court's permission to change his residence or leave the state of Washington, and that he commit no new criminal offenses. Dalluge repeatedly violated each of these conditions, with little sanction from the court. Did the trial court violate Dalluge's constitutional rights to be free of double jeopardy when it did not credit against his incarceration the time Dalluge spent in the community pending trial under conditions of pretrial release he consistently refused to obey? (Assignment of Error No. 1).....1

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I. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

DALLUGE'S CONDITIONS OF RELEASE REQUIRED A \$5,000 SIGNATURE BOND, WEEKLY CONTACT WITH HIS LAWYER, THE COURT'S PERMISSION TO CHANGE HIS RESIDENCE OR LEAVE THE STATE OF WASHINGTON, AND THAT HE COMMIT NO NEW CRIMINAL OFFENSES. DALLUGE REPEATEDLY VIOLATED EACH OF THESE CONDITIONS, WITH LITTLE SANCTION FROM THE COURT. DID THE TRIAL COURT VIOLATE DALLUGE'S CONSTITUTIONAL RIGHTS TO BE FREE OF DOUBLE JEOPARDY WHEN IT DID NOT CREDIT AGAINST HIS INCARCERATION THE TIME DALLUGE SPENT IN THE COMMUNITY PENDING TRIAL UNDER CONDITIONS OF PRETRIAL RELEASE HE CONSISTENTLY REFUSED TO OBEY? (ASSIGNMENT OF ERROR NO. 1)

II. STATEMENT OF THE CASE¹

Appellant Amel W. Dalluge first appeared in this matter in Grant County Superior Court on January 27, 2017, when court signed an Order Setting Conditions of Release. CP at 82–83. Dalluge's previous Grant County criminal convictions included rape, assault, burglary and theft, escape from community custody, possession of a weapon in a correctional institution, malicious prosecution, and possession of methamphetamine. CP at 56–57. He also had a felony harassment conviction in Clallam County. CP at 56.

Although the judge did not check the box on the order next to the pre-printed findings supporting imposition of conditions, he did order

¹ The record in this case consists of sequentially-paginated Clerk's Papers, cited as CP at ____, a sequentially paginated Report of Proceedings prepared by Kenneth C. Beck transcribing ten separate hearings, cited as RP (Beck) ____; and a Report of Proceedings of a single hearing prepared by Tom R. Bartunek, cited as RP (Bartunek) ____.

Dalluge to make weekly contact with his attorney,² and to obtain the court's written permission before leaving Washington state or moving from his stated address. CP at 82. He was also prohibited from using or possessing a firearm and from committing any criminal offense. CP at 82. The court ordered a \$5,000 signature bond to ensure compliance. CP at 83. Nothing in the record demonstrates Dalluge executed a promissory note and the signature bond was not co-signed. CP at 83. Dalluge signed the release conditions order. CP at 83.

At the start of Dalluge's March 31, 2017 omnibus hearing about two months later, defense counsel asked for a continuance and explained he was unprepared because Dalluge had failed to make contact. RP (Beck) at 4. The State did not ask for sanctions and the court rescheduled the hearing to May 9, 2017 without admonishing Dalluge. RP (Beck) at 4–5.

Dalluge failed to appear at the May 9 hearing, although the State had agreed to wait an hour and a half before calling the case. RP (Beck) at 6. The court entered a bench warrant and set \$5,000 bail. RP (Beck) at 7. The omnibus hearing was rescheduled for June 26, 2017. RP (Beck) at 9. Dalluge, by then out of custody again, did not appear. RP (Beck) at 9.

² At one point in his brief, Dalluge asserts the court ordered him to *meet* with assigned counsel once a week, Br. of Appellant at 8, but this appears to be a simple language error. Earlier in his brief, he correctly recites he was required to *make contact* with assigned counsel every week. Br. of appellant at 2.

Dalluge was not present when the again-rescheduled hearing was called the following day, June 27. RP (Beck) at 8. He eventually appeared later that afternoon. RP (Beck) at 9. Again, no sanctions were ordered. RP (Beck) at 9–10.

By July 19, 2017, the State had filed charges against Dalluge in a new case for failure to register as a sex offender. RP (Beck) at 43–44. Dalluge was incarcerated, but not on the case which is the subject of this appeal. RP (Beck) at 47. On August 7, 2017, Dalluge appeared in this case with new counsel, who continued trial. RP (Beck) at 54–55. The court signed an order amending Dalluge’s conditions of release, and, noting the residence address Dalluge provided was deficient, asked counsel for “a better address or a more complete address” to fill in later. RP (Beck) at 56.

By October 2, 2017, Dalluge had two additional felony cases pending and the court was, yet again, unable to complete the omnibus hearing in this case. RP (Beck) at 58, 71.

On March 30, 2018, the court held a preliminary hearing in a new case against Dalluge. RP (Beck) 171. The court set bail at \$1,000 cash or bond. Dalluge gave the court a Soap Lake address. RP (Beck) at 173. The State contested the validity of that address, informing the court law enforcement had been unable to confirm Dalluge lived at that address, a conclusion supported by the multiple occasions in which Dalluge had

failed to appear on time for various hearings with the excuse he had to come to the Ephrata courthouse from Moses Lake, 20 miles from the Soap Lake address where he was supposed to reside. RP (Beck) at 175. The court noted that, in case at issue here, Dalluge was still on record as living at the original Moses Lake address.³ RP (Beck) at 176. The State responded it had filed a motion to revoke the original signature bond in this case. RP (Beck) at 177.

On April 24, 2018, the court increased Dalluge's \$5,000 signature bond to \$2,500 bail. CP at 85.

Dalluge pleaded guilty to the charge of possession of heroin on May 14, 2018, surprising his attorney, the State, and the court. RP (Beck) at 180. About a week later, Dalluge moved to withdraw his plea and asked to continue sentencing. RP (Beck) at 189. Discussion of interim release conditions addressed, among other issues, charges in a new matter arising from events alleged to have occurred February 23, 2018, including second degree burglary, second degree theft, and possessing stolen property. RP (Beck) 195. The State requested the court specifically require Dalluge to maintain weekly contact with counsel, explaining Dalluge had consistently

³ Dalluge's failure to disclose a new residence address or report as homeless after having been evicted from the Moses Lake residence in March 2017, shortly after the commencement of this case, was the circumstance underlying his failure to register charges at issue in *State v. Dalluge*, Cause No. 17-1-00401-7, Court of Appeals No. 36015-6-III.

failed in all his other cases to communicate with counsel outside court. RP (Beck) 196. Counsel responded this directive would be unnecessary because Dalluge's three or four other pending matters made it unlikely he would be released from custody, allowing counsel to contact him at the jail whenever necessary. RP (Beck) at 197. The court did instruct Dalluge to remain in regular contact with counsel if released. RP (Beck) at 198.

The court eventually denied Dalluge's motion to withdraw his guilty plea. RP (Bartunek) at 38. He was finally sentenced in this case on January 7, 2019. RP (Beck) at 231; CP at 58.

III. ARGUMENT

DALLUGE'S CONDITIONS OF RELEASE REQUIRED A \$5,000 SIGNATURE BOND, WEEKLY CONTACT WITH HIS LAWYER, THE COURT'S PERMISSION TO CHANGE HIS RESIDENCE OR LEAVE THE STATE OF WASHINGTON, AND THAT HE NOT POSSESS FIREARMS OR COMMIT NEW CRIMINAL OFFENSES. DALLUGE REPEATEDLY VIOLATED EACH OF THESE CONDITIONS, WITH LITTLE SANCTION FROM THE COURT. DALLUGE'S CONSTITUTIONAL RIGHTS TO BE FREE OF DOUBLE JEOPARDY WERE IN NO WAY VIOLATED BY A SENTENCING ORDER THAT DID NOT CREDIT HIM FOR THE TIME HE SPENT IN THE COMMUNITY AWAITING TRIAL.

Dalluge correctly asserts that "punishment already exacted must be fully 'credited' " against his sentence. Br. of Appellant at 5 (citations omitted). He has not, however, and cannot demonstrate any creditable period of punishment in this case prior to sentencing.

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A. *Standard of review*

A double jeopardy challenge predicated on the argument a defendant is being punished twice for the same offense is reviewed “ ‘de novo, and legislative intent is the touchstone.’ ” *State v. Muhammad*, 194 Wn.2d 577, 616, 451 P.3d 1060 (2019) (quoting *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008)).

B. *The trial court’s omission of a check-mark in the box next to pre-printed findings supporting imposition of restrictive release conditions is an obvious scrivener’s error.*

At the time of his arrest in this case, Mr. Dalluge was well known to the Grant County Superior Court,⁴ having been convicted in Washington of twelve felonies, all but one having occurred in Grant County. CP at 061. Among these were third degree rape, second and third degree assault, harassment (threats to kill), two separate charges of second degree theft, a second degree burglary, and escape from community custody. CP at 061. It is reasonable to conclude the trial court was mindful of Dalluge’s criminal history in January 2017 when it imposed the relatively-benign release conditions complained of here.

⁴ Dalluge is also well known to this Court, and to the Washington Supreme Court. *In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 816, 177 P.3d 675 (2008) (“Dalluge is no stranger to this court.”)

Dalluge was ordered to make weekly contact with his attorney and to obtain the court's written permission before leaving Washington state or moving from his stated address. CP at 82. He was also prohibited from using or possessing a firearm, a right he had lost with his multiple felony convictions long before January 2017. Finally, he was ordered not to commit any further criminal offenses. CP at 82. Although these conditions proved difficult for Dalluge, they should not have.

The court ordered a \$5,000 signature bond to ensure compliance. CP at 83. There is nothing in this record to support Dalluge's assertion the court required a promissory note, a co-signer, or any security other than Dalluge's signature on the Order Setting Conditions of Release. CP at 83. As will be developed further below, the record establishes Dalluge suffered few sanctions for repeatedly violating these conditions, and none of the sanctions imposed included financial liability on his signature bond.

C. The restrictions imposed on Dalluge do not support credit for time served either on their face or by their effect.

1. Washington law neither authorizes nor requires credit for presentencing time not spent in custody.
 - a. Credit is given for confinement served before sentencing. By its statutory definition, "confinement" does not include time spent under pre-trial release conditions.

There is no question that “[t]he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” RCW 9.94A.505(6).

The SRA does not require or authorize credit for time not spent in confinement before sentencing. The question Dalluge urges this court to consider—whether he should be credited for time spent before sentencing under release conditions—has already been answered with a resounding “no” by the definition of “confinement” established by RCW 9.94A.030: “‘Confinement’ means total or partial confinement . . .” RCW 9.94A.030(8).

“Partial confinement” means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention, electronic monitoring, or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program or the graduated reentry program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. *Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.*

RCW 9.94A.030(36) (emphasis added). None of the conditions imposed on Dalluge can be found in the statutory definition of “partial confinement.”

- b. Presentence “home detention” time qualifying as “confinement” must include either confinement to the residence or electronic surveillance, neither of which were imposed on Dalluge.

Whether an offender *should* be given credit for time spent in the community on release conditions has already been answered, and the answer is, again, “no.” *State v. Dockens*, 156 Wn. App. 793, 798, 236 P.3d 211 (2010). Comparison of Dalluge’s circumstances with those of Dockens establishes the absence of an issue of public importance in this case.

Dockens argued failure to credit him for presentence time spent under release conditions violated his equal protection rights. *Dockens*, 156 Wn. App. at 795. He had been released pending trial on the following conditions requiring him to:

- (1) Maintain a residence at 432 E. Front Street, Port Angeles, Washington;
- (2) Not travel outside western Washington;
- (3) Maintain a curfew at his residence of 8 pm to 6 am (later modified to allow attendance at voluntary drug treatment activities);
- (4) Have no contact or communication with Evergreen or employer David Anstett;
- (5) Not possess any firearms or other deadly weapons;
- (6) Not drink or possess intoxicating liquors and remain out of places where alcohol is the chief item of sale;
- (7) Not use or possess any drugs except as prescribed by a physician;
- (8) Obey all criminal laws;

- (9) Maintain contact with his attorney and return to court as directed;
- (10) Surrender his passport to Port Angeles Police Department prior to release; and
- (11) Report daily (Monday through Friday) to an electronic home monitoring office.

Dockens, 156 Wn. App. at 795–96 (emphasis added). These conditions were far more onerous than those imposed on Dalluge. Dockens was prohibited from, among other things, traveling to eastern Washington, being outside his residence at night, and possessing or using intoxicants. Dalluge was not. Dockens also had to report daily to an electronic home monitoring office, in addition to maintaining contact with his attorney. He argued on appeal that these conditions amounted to “house arrest.”

Dockens, 156 Wn. App. at 795.

Division Two of this Court rejected that argument. It found the curfew reasonable and was not offended that Dockens was required to “spend a few minutes checking in with a contract monitoring agency on weekdays[,]” noting there was “no duty to check in on the weekends and he was allowed to travel throughout *western* Washington without prior court approval.” *Dockens*, 156 Wn. App. at 799 (emphasis added). Dockens was not subject to electronic home monitoring, so was not “confined under the statutory definition of ‘home detention[.]’” *Id.* “No equal protection violation [was] implicated.” *Id.* “[T]o qualify for credit

for presentence ‘home detention’ time, the offender must be confined in his private residence under electronic surveillance.” *Id.*

2. The effect of Dalluge’s pretrial conditions was neither punitive nor restrictive.

The purpose of conditions set pursuant to Criminal Rule (CrR) 3.2 are not punitive, but are designed to “alleviate some of the burdens imposed upon an accused individual awaiting trial in jail.” *Harris v. Charles*, 171 Wn.2d 455, 468, 256 P.3d 328 (2011). When assessing whether to credit nonjail time, courts recognize “a constitutional distinction between liberty restrictions equal to time spent in jail or prison, and less substantial liberty curtailments.” *Id.* at 471 (citations omitted). The *Harris* court held conditions of electronic home monitoring essentially eliminated the hardships associated with time spent in jail when the defendant was *allowed* to visit his attorney, to run personal errands going to and from those visits, live pretty much as he had before being charged, and “ ‘suffered neither the stigma or the discomfort of jail time while on EHM.’ ” *Id.* at 472 (citing and quoting *State v. Perrett*, 86 Wash.App. 312, 318–19, 936 P.2d 426 (1997)) (emphasis added).

Nothing in the record indicates Dalluge’s liberty was significantly altered or that he was punished in any meaningful way for his repeated violations of these simple orders. He did not make weekly, or even

monthly, contact with his attorneys. RP (Beck) at 4, 197. He changed his residence without notifying the court and did not provide the court accurate residential information. *State v. Dalluge*, 36015-6-III at 1 (2020); RP (Beck) at 175-76; CP at 56. Between the date of the order and Dalluge's sentencing, he was charged, tried, and convicted for failure to register as a sex offender. CP at 61. He had at least three newer felony matters pending, one involving burglary, theft, and possession of stolen property that occurred over a year after entry of the release conditions at issue here. RP (Beck) 195, 197. Despite these violations, neither the court nor the state forced Dalluge to make good on his \$5,000 signature bond. Instead, after nearly 15 months of unsanctioned violations,⁵ the court changed Dalluge's signature bond to \$2,500 bail, cash or bond. CP at 85.

Dalluge's time awaiting trial in this case was spent running amok and repeatedly violating each of the restrictions of which he now complains.

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⁵ The only time the court issued a warrant for Dalluge was when he failed to appear for an omnibus hearing, RP (Beck) at 6-7, and Dalluge was out of custody again in time to miss a scheduled hearing about six weeks later. RP (Beck) at 9.

IV. CONCLUSION

This Court should reject Dalluge's argument that his liberty pending trial was restricted in to an extent equal to time spent in jail or prison and affirm his sentence as entered, without credit for any time he was not incarcerated solely on these charges.

DATED this 30th day of March, 2020.

Respectfully submitted,

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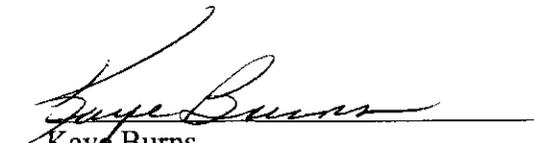
CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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March 30, 2020 - 1:18 PM

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Appellate Court Case Title: State of Washington v. Amel William Dalluge
Superior Court Case Number: 17-1-00072-1

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